Supreme Court, U.S.
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No. 01-1697

IN THE

Supreme Court of the United States

HEMA MENON,

Petitioner,

v.

LAWRENCE FRINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner was involved in two motor vehicle accidents in Danbury, Connecticut, both of which were investigated by Officer Frinton. J.A. 44-47, Affidavit of L. Frinton. The first accident occurred on March 13, 1990, at the intersection of Kalian Drive and Judith Drive. *Id.* Officer Frinton completed a police accident report as part of his investigation. J.A. 48-9. Based on Officer Frinton's investigation at the scene of that accident, he found probable cause existed that the petitioner, Ms. Menon, caused the 1990 accident. J.A. 44-47, 48-49. Petitioner can hardly dispute this finding of fault as she was stopped at a stop sign, pulled forward into traffic, and struck a car approaching from her left that had the right of way. J.A. 48-49. Officer Frinton did not issue a citation to the petitioner as a result of the accident. This certainly represents fair treatment by Officer Frinton. The petitioner thereafter reported the 1990 accident to the Department of Motor Vehicles, as was her duty under law. J.A. 66-72. There is no evidence Officer Frinton ever saw this report. J.A. 45.

Six years later, on February 20, 1996, the petitioner was involved in a second motor vehicle accident, with Ann Dux, on Lake Avenue Extension in Danbury, Connecticut that, coincidentally, was also investigated by Officer Frinton. J.A. 44-47, Affidavit of L. Frinton. As a result of his investigation of the 1996 accident, Officer Frinton found probable cause that the petitioner violated Conn. Gen. Stat. § 14-240 of the motor vehicle traffic laws, issued her a summons and completed a police accident report. J.A. 44-47, 50-51. It is undisputed that petitioner told Officer Frinton she had been traveling behind Ms. Dux prior to the accident, which justified his issuance of a ticket for "following too

close" in violation of Conn. Gen. Stat. § 14-240. J.A. 33-34. Petitioner also admits that Officer Frinton examined the damage to both vehicles before determining fault. J.A. 31-33. Thereafter, he filed a supplemental report, reaffirming his finding that probable cause existed for the violation. J.A. 52-53

The petitioner, Hema Menon, filed this § 1983 action by Complaint dated February 16, 1999 against Officer Lawrence Frinton, in his individual capacity only. J.A. 7-13. The petitioner claimed violations of her First Amendment right to freedom of speech and freedom to petition the government for redress of grievances. *Id.* The petitioner further alleged Officer Frinton violated her Fourth and Fourteenth Amendment rights in that the petitioner was falsely accused of a violation of the motor vehicle laws, Conn. Gen. Stat. § 14-240, following too closely, and alleged a cause of action for malicious prosecution at common law. *Id.* The petitioner claims Officer Frinton retaliated against her in violation of her due process rights and also asserted a violation of the Equal Protection clause. *Id.* Finally, the petitioner claimed Officer Frinton "violated her right to be free from reckless or intentional infliction of severe emotional distress as guaranteed by Connecticut law".

The District Court, Nevas, J., found that Officer Frinton had probable cause to issue the appellant a summons after the second accident and, as such, found him to enjoy qualified immunity because his investigation and actions were objectively reasonable under the circumstances then and there existing. The District Court also found that Officer Frinton was entitled to summary judgment on the appellant's retaliation claim because his investigation of the 1996 accident was objectively reasonable and the petitioner has

presented no evidence of improper motive. Similarly, the District Court concluded that the petitioner had failed to produce any significant, probative evidence of a violation of the Equal Protection Clause. The District Court found no deprivation of any constitutional right, freedom of speech or otherwise. Moreover, as a matter of law, the District Court concluded that Officer Frinton's actions did not constitute intentional infliction of emotional distress.

The United States Court of Appeals for the Second Circuit affirmed the District Court. Respondent submits this honorable Court should deny the petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals and the decision of District Court demonstrate that the Petitioner failed to carry her burden opposing summary judgment and her claims were properly dismissed. The decision of the District Court properly examined the evidence submitted by the parties and did not find a dispute as to a fact material to the disposition of the case. *See* Petition, App. p. 4, 11-13.

At summary judgment, after the moving party has met its burden to demonstrate that there is no dispute as to any material fact, the non-moving party has the obligation to bring forward significant, probative evidence, which would be admissible at trial to demonstrate the existence of any dispute. If the non-moving party submits evidence that is "merely colorable," or "is not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Unsupported allegations do not create a material issue of fact. *See Goenaga v. March of Dimes Birth Defects Fund*, 51 F.3d 14, 18 (2d Cir. 1995); *see also Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991).

Once the moving party has carried its burden under Rule 56(c), "the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The motion "will not be defeated merely . . . on the basis of conjecture or surmise." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991). The party opposing summary judgment may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, *L & L Started Pullets, Inc. v. Gourdine*, 762 F.2d 1, 3-4 (2d Cir. 1985); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *Curl v. IBM Corp.*, 517 F.2d 212, 214 (5th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976), or "upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e). Similarly, unsworn statements of the parties, letters addressed to litigants from third persons, and hearsay which does not fall under one or more of the exceptions listed in Rules 803-805 of the Federal Rules of Evidence, may not properly be considered. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Beyene v. Coleman*

Security Services, Inc., 854 F.2d 1179 (9th Cir. 1988); *Edward B. Marks Music Corp. v. Stasny Music Corp.*, 1 F.R.D. 720 (S.D.N.Y. 1941).

A cursory review of the Petition indicates that Menon is doing exactly what this Court has cautioned against in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). At page 3 of the petition, the petitioner claims the "evidence is in dispute," however, the court specifically found that the petitioner proffered no competent evidence to meet the evidence provided by the moving party at summary judgment. The petitioner's representation that the respondent "recognized her, ridiculed her speech and stature" is plainly false. At page 5 of the petition, the Petitioner offers portions of her deposition transcript as part of her nexus of "facts," yet the vast majority of her "facts" are culled from multi-page unsworn letters which does not constitute the kind of significant, probative evidence required to meet her burden. *See L & L Started Pullets, Inc. v. Gourdine*, 762 F.2d 1, 3-4 (2d Cir. 1985); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *Curl v. IBM Corp.*, 517 F.2d 212, 214 (5th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976). Moreover, many of the claimed facts are not material and would make no difference in the outcome of the case. The province of the court in this instance is the determination of whether a dispute about a material fact exists. Finding no dispute, the District Court properly granted summary judgment as hundreds of courts have done on a regular basis. *See* Petition, App., p. 11-13. The Court of Appeals properly affirmed. *See* Petition, App., p. 4.

The District Court, Nevas, J., found that Officer Frinton had probable cause to issue the appellant a summons after

the second accident and, as such, found him to enjoy qualified immunity because his investigation and actions were objectively reasonable under the circumstances then and there existing. *See* Petition, App., p. 10-1. The District Court also found that Officer Frinton was entitled to summary judgment on the appellant's retaliation claim because his investigation of the 1996 accident was objectively reasonable and the plaintiff presented no evidence of improper motive.

Importantly, the Petitioner's claim that this area of the law needs "clarification" is unavailing as a reason for review by this Honorable Court. The Petitioner ignores the long-standing principle that the fact that an official's actions were objectively reasonable will in itself be evidence that there was no retaliatory motive. *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995). "In order to state a valid due process claim for retaliation, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected and that retaliation against the protected conduct was a 'substantial or motivating factor in the defendant's actions.'" *Blue v. Koren*, 72 F.3d 1075, 1082 (2d Cir. 1995). In addition, upon a motion for summary judgment based on the affirmative defense of qualified immunity, "the plaintiff must proffer particularized evidence of direct or circumstantial facts, as suggested in Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 226, at 236, 111 S. Ct. at 1795, supporting the claim of an improper motive in order to avoid summary judgment." *Blue v. Koren* at 1084. "In our view, the particularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." *Id.* That an official's actions were objectively reasonable will in itself be evidence that there was no retaliatory motive. *Id.* at 1084.

Both the District Court and the Court of Appeals recognized that the Respondent's actions and his investigation of the February 20, 1996 accident involving the plaintiff were objectively reasonable. He was called to the scene of an accident, interviewed both drivers and surveyed the damage to the vehicles. It was a routine traffic accident and was an exercise Officer Frinton had completed on hundreds of other occasions. J.A. 44-46. The only fact on which plaintiff relies for her retaliation claim seems to be that Officer Frinton previously investigated her March 13, 1990 accident. The undisputed evidence in that: (1) defendant Frinton had no knowledge of the report Menon claims she submitted to the Motor Vehicle Department after the 1990 accident (J.A. 45); and (2) that neither Menon nor Frinton mentioned the 1990 accident during the 1996 traffic stop. J.A. 35. The proffer of some evidence other than the prior event is required. *Blue v. Koren, supra*. Otherwise, "officials, who may in the course of carrying out their duties have continuing run-ins with those whose conduct the officials must monitor, will be forced to go to trial when the only evidence of unconstitutional motive may be a prior dispute with the plaintiff, if that." *Id*. The Petitioner, at most, has testified to her version of the facts and proffered these facts as the gospel truth, all without any corroborating direct evidence. *See* J.A 74-6, App. Br. 7-10, 14. The District Court found no dispute existed as to the material facts and granted the motion for summary judgment.

Nothing produced by the Petitioner constitutes the sort of significant, probative evidence required to defeat a motion for summary judgment. Disputes as to material facts are not created by conjecture or surmise. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991).

Similarly, the District Court concluded that the plaintiff had failed to produce any significant, probative evidence of a violation of the Equal Protection Clause. *See* Petition, Appendix, p. 13-4. The District Court found no deprivation of any constitutional right, freedom of speech or otherwise.

The Court of Appeals agreed, affirming the District Court — just as it affirms many decisions granting summary judgment where the non-moving party does not carry its burden. The Petitioner had the opportunity to meet the evidence proffered by the respondent at summary judgment yet failed to do so.

CONCLUSION

The Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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